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No.

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CLERK

Supreme Court of the United States

October Term, 1983

SANFORD J. BERGER,
Petitioner,

-vs-

McMONAGLE, JUDGE, ET AL.,
Respondents.

On Writ Of Certiorari To The Supreme Court
Of The State Of Ohio

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

SANFORD J. BERGER (Pro Se)
Counsel of Record
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115
Phone: (216) 781-5950

Of Counsel:
ROBERT M. FERTEL
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115

QUESTIONS PRESENTED

1. Can a state constitution guaranteeing an elected judiciary, and mandating that all judges who reach the age of seventy must retire: by constitutional amendment then provide the Chief Justice of the state supreme court with authority to appoint those same retired judges for perpetually renewable terms at his pleasure without the state amendment violating the Equal Protection Clause of the Fourteenth Amendment?

2. In a suffrage state, can the Chief Justice of the state supreme court unilaterally set up his own private state-wide judicial system, totally independent of the Ohio electorate, comprised of elderly private citizens who are only accountable to the Chief Justice, and whose tenure in office is totally dependent upon their being in good favor with the Chief Justice?

3. Can a state supreme court, by its promulgated Rules of Superintendence governing multi-judge trial courts, create three classes of litigants: one class being entitled to an elected judge chosen by random public lot; a second class assigned an elected judge by secret choice of the administrative trial judge, and a third class assigned a non-elected retired judge by arbitrary decision of the administrative trial judge?

4. Does unconstitutional state deprivation of property occur when a state supreme court promulgates a rule governing multi-judge trial court procedures which mandates that elected judges be assigned by random public lot to all new cases unless removed or disqualified for justifiable cause, while simultaneously giving license to the administrative judge thereof to arbitrarily deprive a litigant of such due process right without predeprivation procedures?

5. Subsidiary question. Can the Chief Justice of a state supreme court act in a legislative capacity by arbitrarily appointing retired judges to various home rule entities in a state, and by virtue of such appointments, compel those governmental entities to pay the state established compensation owing, when those governmental entities have not agreed beforehand to assume those liabilities?

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THE OPINIONS DELIVERED BELOW

The Opinion of the Supreme Court of Ohio is entitled State ex rel. Berger v. McMonagle, 6 Ohio St. 3d 28 (1983) and is appended as A1-A9. The Opinion of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio is unreported and appended as A10-A21.

JURISDICTION

The Opinion of the Supreme Court of Ohio was rendered on July 13, 1983, and this petition for certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution.

Sec. 6, Article IV of the Ohio Constitution.

Ohio Revised Code Sec. 141.16.

Ohio Revised Code Sec. 2921.44.

Ohio Revised Code Sec. 2921.45

Common Pleas Superintendence Rules 3 and 4.

Local Rule 15 of Court of Common Pleas, Cuyahoga County, Ohio.

All appear in the Appendix; set forth verbatim or in pertinent text.

STATEMENT OF THE CASE INCLUDING THE RAISING OF THE FEDERAL QUESTIONS

Petitioner, Sanford J. Berger, has a history of being "steered" to judges by the administrative judges of the Court of Common Pleas and the administrative judge of the Division of Domestic Relations thereof, of Cuyahoga County, Ohio, after he had been assigned an elected judge by random public lot.

In 1976, the law in Ohio was clear that any action taken by a non-assigned intruding judge was void. Rosenberg v. Gattarello, (8th App. Dist.), 49 Ohio App. 2d 87 (1976). In essence, the Court of Appeals said that trial judges are not allowed to break the law.

Relying on Rosenberg, petitioner took an appeal to the same Court of Appeals in 1981, resulting in the decision in Berger v. Berger, (8th App. Dist.), 3 Ohio App. 3d 125 (1981) stating that actions taken by non-assigned intruding judges, were now voidable only:

> "The administrative judge for a multi-judge division of the Common Pleas Court has authority to determine preliminary matters in the

> case when the assigned judge is unavailable or to reassign any case to himself or any other judge of that court, by a journalized order stating a justifiable reason for transferring responsibility for the case to himself or to another judge.
>
> Absent a journalized order by the administrative judge --- explaining his need for his action ..., any other judge assuming to act has no authority and his rulings are voidable on timely objection by any party."

In essence, the Court of Appeals now said that trial judges were still not allowed to break the law, but that there was now a thirty day statute of limitations (time of appeal) to challenge the illegality.

Sometime prior thereto, petitioner had filed another action in the Court of Common Pleas; lost on a summary judgment motion, appealed and prevailed, and the case was remanded. The administrative judge of the Court of Common Pleas thereupon assigned it by secret lot to an elected judge in contravention of C.P. Sup. R.4 (A8) and Local Rule 15(A24) which mandate that only the Clerk of Courts can have a sealed deck of elected judges' names - no provision being made for the administrative judge to also have a deck of cards. The names of retired judges assigned by the Chief Justice of the Ohio

Supreme Court, by virtue of Sec. 6(C), Article IV (A22), are never contained in the sealed deck.

Subsequently, the administrative judge, without benefit of a journalized order, had the case removed from the assigned elected judge, and again without benefit of a journalized order, assigned the case to retired judge, George McMonagle. Judge McMonagle thereupon called the matter for pre-trial, whereupon petitioner filed objections to Judge McMonagle sitting on the basis of Berger v. Berger, supra, and the fact that opposing counsel was the nephew of Judge McMonagle. At the pre-trial hearing, petitioner made demand that Judge McMonagle disqualify himself, which demand was overruled, as were petitioner's written objections. Petitioner raising the federal constitutional questions in his written and oral objections.

Petitioner then filed an action in the Court of Appeals seeking a writ of prohibition preventing Judge McMonagle from hearing the case and a writ of mandamus ordering the administrative judge to have the Clerk of Courts assign the proceeding by random public lot to a duly elected judge, raising the federal constitutional questions therein. The Opinion of the Court of Appeals in Berger v. Berger, supra, and the Opinion of

the Court of Appeals herein were both written by the same judge, the Hon. Richard M. Markus.

The Court of Appeals denied the requested writs (A10 to A21), whereupon petitioner appealed as of right to the Supreme Court of Ohio, again raising the federal constitutional questions, wherein the requested writs were again denied (A1 to A9).

In essence, the Opinions of both the Court of Appeals and the Ohio Supreme Court now hold that it is proper for trial judges to knowingly and intentionally violate the law and procedures promulgated to assure a fair and unbiased trial, before trial, and the only recourse is appeal and the hope of success so that you can be sent back to the same merry-go-round of injustice.

ARGUMENT

Sec. 6(A)(3), Art. IV of the Ohio Constitution (A22) states that common pleas judges shall be elected by the electors, while Sec. 6(C), Art. IV (A23), states that they cannot hold judicial office if they have attained the age of seventy. In contradiction of the age limitation, Sec. 6(C), Art. IV then grants the chief justice of the Ohio Supreme Court authority to appoint retired judges with no limitation as to length of

appointment. For example: the following front page items from Cleveland's only newspaper, The Plain Dealer:

> "Judge illegal for years; cases in doubt. Sept. 7, 1983.
> Theodore M. Williams served illegally as a visiting judge in Cleveland Municipal Court for more than seven years because he had not been reappointed, Ohio Supreme Court officials have determined.....His daily pay was the same as municipal judges who earn $50,750 a year."

> "Retired judge: Chief Justice cut me out. Sept. 9, 1983.
> Retired Shaker Heights Municipal Judge Manuel M. Rocker said he has been unable to serve as a visiting judge in Greater Cleveland courts this year because he offended Ohio Supreme Court Chief Justice Frank D. Celebrezze by writing an article on judicial merit selection....."

Sec. 6, Art. IV became effective on November 6, 1973, and by virtue of Ohio Rev. Code Sec. 141.16, at (A23), the Chief Justice has been able to set up a statewide network of retired private citizens as judges and have the counties wherein they sit pay their compensation. State, ex rel. Winn v. Galvin, 39 Ohio St. 2d 58 (1974). They are only accountable to him and must remain in his good favor. Coincidentally, it is probably the most powerful political entity in the state, assuring election and re-election of

the judiciary favored by the Chief Justice. When the younger brother of the Chief Justice decided to run for the Ohio Supreme Court, he was elected with ease, eventhough he was deemed "unqualified" by the Ohio State Bar Association. In response, the Supreme Court stripped the Bar of the power to hear grievances against judges, and empowered the Chief Justice to appoint a nine member board in its place. Ohio State Bar Association Report, August 8, 1983.

Accordingly, the appointed judiciary, arrived, as Sandburg's Fog, on little cat feet, unscrutinized by the Ohio electorate. That the concept of an appointed judiciary was repugnant to the Ohio Supreme Court previously, was set forth in Hilton v. Bell, 108 Ohio St. 233, 238 (1923):

> "Not only does the express language of the judicial article of the Constitution, but its entire spirit, breathe antagonism to an appointed judiciary."

The opinion then continued that only the state Governor has power to make appointments, and then only to fill a vacancy until the next general election. Also see, Cherrington v. Hutsinpiller, 112 Ohio St. 468, at 475 (1925), and State, ex rel. Graves v. Brown, 18 Ohio St. 2d 61 (1969).

C.P. Sup. R.4 (A8) and Local Rule 15

(A24), when read in pari materia, state that a litigant is procedurally entitled to a blind draw public lot assignment of an elected judge (since only the names of elected judges are in the sealed deck). When a litigant is "steered" to a retired, non-elected judge, the result is similarly situated litigants being treated in a dissimilar manner. As in Logan v. Zimmerman Brush Co. et al., 455 U.S. 426 (1982), this is the very essence of arbitrary state action.

Imposing special disabilities upon certain individuals suggests the kind of "class or caste" treatment the Fourteenth Amendment was designed to abolish. Pyler v. Doe, 457 U.S. 202, 216 n. 14 (1982). "The Equal Protection Clause imposes a requirement of some rationality in the nature of the class singled out." James v. Strange, 407 U.S. 128, 140 (1972).

Laws nondiscriminatory on their face may be grossly discriminatory in their operation; Williams v. Illinois, 399 U.S. 235 (1970), and classifications can only be created in a manner rationally related to legitimate governmental objectives. Schweiker v. Wilson, 450 U.S. 221, 230 (1980). Permitting the administrative judge to shuffle case assignments without any standards renders the practice arbitrary and discriminatory.

Neimotko v. Maryland, 340 U.S. 268 (1951).

Practices allowing the supposedly temporary appointment of retired judges infringes on a litigant's right in a suffrage state to elect and hold accountable persons who perform duties as judges or other elected offices. Hortonville District v. Hortonville Education Ass., 426 U.S. 482, 496 (1976), and Hilton v. Bell, supra, p. 238.

Petitioner's right to vote is unconstitutionally diluted when he is deprived of his right to have his case heard by a judge elected by the electorate. He is not being denied the right to vote, but the benefit of the consequences of his right to vote. Baker v. Carr, 369 U.S. 186, 207-208 (1962); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968); Reynolds v. Sims, 377 U.S. 533, 554-555 (1964), and Hadley v. Junior College District, 397 U.S. 50, 54 (1970).

In a recent well publicized, but as yet unreported federal criminal case, U.S. v. August and Bozoff, No. 82-80156 (E.D., Mich., S.D., June 28, 1983), a prominent bankruptcy attorney and an intake clerk were convicted of violating the federal obstruction of justice statute, 18 U.S.C. Sec. 1503, by manipulating the blind draw assignment procedure. Ohio, too, has similar criminal statutes:

> Ohio Rev. Code Sec. 2921.44
> Dereliction of Duty
> (E) No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to his office, or recklessly do any act expressly forbidden by law with respect to his office.
>
> Ohio Rev. Code Sec. 2921.45
> Interfering with civil rights.
> (A) No public servant, under color of his office, employment, or authority, shall knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right.

Can an act which is morally, ethically and criminally wrong when performed on a federal level by an attorney and federal employee be purged of its illegality simply because it is performed on a state level by an administrative judge?

C.P. Sup. R.4 and Local Rule 15 as interpreted previously in Rosenberg and Berger, supra, and even without interpretation, created a property interest protected by the Due Process Clause of the Fourteenth Amendment, Logan v. Zimmerman Brush Co., et al., supra.

Unlike the openness of the school environment in Ingraham v. Wright, 430 U.S. 651, 678 (1977), an unpopular litigant whose case is arbitrarily transferred or reassigned secretly, is faced with the impossible task of proving malice or bad faith. Absent

standards for transferring or reassigning cases, there is a deprivation of a property interest without due process safeguards being employed. Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

A plaintiff in a civil case is entitled to a fair hearing before a fair tribunal. Marshall v. Jerricho Inc., 446 U.S. 238, 242 (1980). As clearly stated in Flynt v. Leis, 574 F. 2d 874, 877 (C.A., 6, 1978), vacated on other grounds, 439 U.S. 438 (1979):

> "In order to insure regularity and impartiality in the administration of justice and secure the similar treatment of similar cases, judges may not upset reasonable expectations in the important affairs of life, such as employment of counsel without a hearing, the application of a reasonably clear standard, and a statement of reasons. Otherwise, it would be too easy to justify and too difficult to remedy random arbitrariness and sporadic justice."

There is no necessity for quick action nor the impracticality of a predeprivation hearing herein, Cf. Parratt v. Taylor, 451 U.S. 527, 539 (1981), but there is a sufficient probability of irreparable injury if the reassignment proves unjustified to require a predeprivation hearing. North Georgia Finishing Inc. v. Di-Chem, Inc. 419 U.S. 601 (1975).

The suggested procedure of accepting the wrong, forcing the litigant through a time consuming and expensive trial, and then a costly appeal in hopes of returning to the place of beginning for the same treatment, is calculated to exhaust a litigant and constitutes a substantial burden on his constitutional right of access to the courts for redress of grievances.

Herein, the state does not provide any procedures to be used in the deprivation of a protected property interest; but even if it did, the procedural requirements of the Due Process Clause are still determined by federal law. Vitek v. Jones, 445 U.S. 480, 490-491 n. 6 (1980); Logan v. Zimmerman Brush Co., supra, p. 432, and Santosky v. Kramer, Com'r, 455 U.S. 745, 755 (1982).

If the three required factors enunciated in Mathews v. Eldridge, 424 U.S. 319, 333 (1976) are to be applied, the Due Process Clause requires a predeprivation hearing before judge manipulation is engaged in.

There is also the subsidiary question as to whether the Chief Justice of a state supreme court can impose the burden of a judge or judges upon an autonomous home rule governmental entity without their prior approval, as in the case of Judge Theodore Williams, supra, who sat for seven years

without not only electorate approval, but without being reappointed by the Chief Justice, although the governmental entity was obliged to pay him compensation for those seven years. But that is an issue unto itself that space does not permit present argument.

CONCLUSION

In 1948, George Orwell wrote a novel satirizing the dehumanizing trends of the age entitled "1984". In the world of Big Brother and the Thought Police, there were no elections anywhere. In Ohio, where we now have Big Brother, as well as his Little Brother, the threats to freedom do not come from the executive branch as Orwell prophesied; but surprisingly, come from the judicial branch of government.

Language in the novel, was a primary tool of manipulation, and doublethink was a mental trick that had to be mastered by rulers and ruled alike. Doublethink was "the power of holding two contradictory beliefs in one's mind simultaneously and accepting both of them," of using "conscious deception while maintaining the firmness of purpose that goes with complete honesty."

The opinions of the Ohio judiciary herein would have petitioner believe that every-

thing that has happened is proper, while his fundamental sense of justice still struggles to hold on to the belief that it is improper - but where do you go to complain, or who do you complain to, when there is no relief within the state.

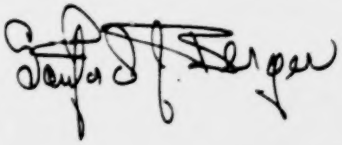
Orwell warned us that freedom is too much taken for granted, that it needs to be carefully watched and protected. He did not say his fictional vision of 1984 was bound to happen. He said it could happen - here. His last word on the subject was a plea to his readers: "Don't let it happen. It depends on you."

To petitioner, that portion of Sec. 6(C), Article IV of the Ohio Constitution, which permits the Chief Justice to create his own private judicial system is a denial of the equal protection of the law and impinges upon the right of suffrage. Further, that inherent in Sec. 6(A)(3), Article IV is a fundamental right entitling every Ohio citizen to have his constitutional rights determined by an elected judge - which right cannot be abrogated in a suffrage state without violating federal equal protection and substantive due process. And, finally, by virtue of C.P. Sup. R. 4 and Local Rule 15, a property interest was created entitling each litigant to a duly elected judge

assigned by blind draw public lot of only the Clerk of Courts, which property interest cannot be taken except by predeprivation due process procedures.

Petitioner now knocks on this Court's door for the fourth time within the past four years, asking the same questions essentially, and seeking relief for himself and the people of Ohio. Frankly, he has not enjoyed committing professional suicide in furtherance of his oath as an attorney.

Respectfully submitted,



SANFORD J. BERGER (Pro Se)
(Counsel of Record)
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115
Phone: (216) 781-5950

Robert M. Fertel,
Of Counsel.

Petitioner believes that 28 U.S.C. Sec. 2403(b) may be applicable, and has, accordingly served three (3) copies of this Petition upon the Attorney General of the State of Ohio by regular mail. A separate proof of service is filed herewith.

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO
(Dated July 13, 1983.)
No. 82-34
THE SUPREME COURT OF THE STATE OF OHIO
The State of Ohio, City of Columbus

THE STATE, EX REL. BERGER,
Appellant,
vs.
McMONAGLE, JUDGE, ET AL.,
Appellees.

Appeal From The Court Of Appeals
For Cuyahoga County

Appellant, Sanford J. Berger, is the plaintiff in a civil action currently pending in the Court of Common Pleas of Cuyahoga County. The action was originally assigned to Judge Harry A. Hanna, who granted a motion for summary judgment in favor of the defendants. On appeal, the court of appeals reversed the judgment of the trial court and remanded the cause for further proceedings.

On remand, Judge Leo M. Spellacy, Administrative Judge of the Court of Common Pleas and an appellee herein, reassigned the case by lot. The assignment was accomplished by selecting a card from a sealed pack in

which each card bears the name of one judge of the court of common pleas. In accordance with this procedure, the case was assigned to Judge James J. Sweeney.

Subsequently, Judge Spellacy, in his capacity as the administrative judge, conducted a review of the caseloads of the judges in the court of common pleas for purposes of adjusting each judge's docket containing overaged cases. The underlying civil action was among one of many civil actions selected for transfer. Accordingly, Judge Spellacy informed Judge Sweeney by letter dated February 18, 1982, that the civil action was eligible for transfer. On February 22, 1982, Judge Sweeney entered an order transferring the case to Judge Spellacy.

Ultimately, the case was assigned to Judge George J. McMonagle, also an appellee, for trial, Judge McMonagle is a retired judge sitting by assignment pursuant to Section 6(C), Article IV of the Ohio Constitution. Appellant filed an objection to the assignment and verbally requested that Judge McMonagle disqualify himself on the basis that he and counsel for the defense were related to one another. The objection was overruled on April 26, 1982.

Appellant then filed the instant action

in the court of appeals seeking a writ of prohibition to prevent Judge McMonagle from hearing the case and a writ of mandamus ordering Judge Spellacy to assign the proceeding by lot to a duly elected judge of the court of common pleas. The court of appeals granted appellees' motion for summary judgment and dismissed the complaint concluding that appellant failed to satisfy the requisite elements necessary for the issuance of either writ.

(29) The cause is now before this court on an appeal as of right.

Mr. Sanford J. Berger, pro se, and Mr. Robert M. Fertel, for appellant.

Mr. John T. Corrigan, prosecuting attorney, Mr. Thomas P. Gill and Mr. Patrick Carroll, for appellees.

Per Curiam. This court has consistently held that in order for a writ of mandamus to issue the relator must demonstrate "(1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law." State, ex rel. Harris, v. Rhodes (1978), 54 Ohio St. 2d 41, 42 (8 O.O. 3d 36); State, ex rel. Heller, v. Miller (1980), 61 Ohio St. 2d 6 (15 O.O. 3d 3), paragraph one of the

syllabus; State, ex rel. Westchester, v. Bacon (1980), 61 Ohio St. 2d 42 (15 O.O. 3d 53), paragraph one of the syllabus.

In order for a writ of prohibition to lie, the following three requirements must be satisfied: "(1) the court or officer against whom it is sought is about to exercise judicial or quasi-judicial power; (2) the exercise of such power is unauthorized by law; and (3) it will result in injury for which no other adequate remedy exists." Ohio Bell v. Ferguson (1980), 61 Ohio St. 2d 74, 76 (15 O.O. 3d 117); State ex rel. Rose Hill Burial Park, v. Moser (1982), 1 Ohio St. 3d 13, 14; State, ex rel. Dow Chemical Co., v. Court (1982), 2 Ohio St. 3d 119, 120.

In support of the request for a writ of mandamus, appellant argues that pursuant to C.P. Sup. R. 4,[1] Judge Spellacy was required to have the remanded proceeding assigned by lot to a duly elected judge of the court of common pleas. Assuming, arguendo, that the proceeding was improperly transferred from Judge Sweeney, in spite of C.P. Sup. R. 3(B)[2] and 9,[3] which (30) enable the administrative judge to implement procedures to facilitate the prompt disposition of cases, appellant has failed to demonstrate the absence of a plain and adequate

remedy in the ordinary course of the law.

It is firmly established that the writ of mandamus will not issue "*** where the relator has or had available a clear, plain and adequate remedy in the ordinary course of the law." State, ex rel. Sibarco Corp., v. City of Berea (1966), 7 Ohio St. 2d 85, 88 (36 O.O. 2d 75); State, ex rel. Leis, v. Outcalt (1980), 62 Ohio St. 2d 331, 333 (16 O.O. 3d 392); State, ex rel. Bargar, v. Ross (1978), 53 Ohio St. 2d 18, 19 (7 O.O. 3d 62); Lippert v. Engle (1977), 52 Ohio St. 2d 67 (6 O.O. 3d 234); State, ex rel. Pressley, v. Indus. Comm. (1967), 11 Ohio St. 2d 141 (40 O.O. 2d 141). Moreover, it is axiomatic that a "*** discretionary right of appeal***(constitutes) a sufficiently plain and adequate remedy in the ordinary course of the law." State ex rel. Cleveland v. Calandra (1980), 62 Ohio St. 2d 121, 122 (16 O.O. 3d 143).

Since appellant possesses an adequate remedy at law by way of appeal to the court of appeals in which he may contest the issue of an improper assignment, the court below properly dismissed the complaint for a writ of mandamus.

Likewise, the availability of an appeal is fatal to appellant's request for a writ of prohibition. This court has repeatedly

held that "(p)rohibition is not concerned with the exercise of discretion by an inferior tribunal having jurisdiction of the subject matter and the parties in a cause before it. That issue is for the determination of a reviewing court," even if errors or defects exist in the proceedings. State, ex rel. Staton, v. Court (1965), 5 Ohio St. 2d 17, 22 (34 O.O. 2d 10); State, ex rel. Gl.ss, v. Marshall (1974), 39 Ohio St. 2d 92, 94 (68 O.O. 2d 54); State, ex rel. Dow Chemical Co., v. Court, supra, at 121. In addition, "prohibition cannot be used as a substitute for appeal," which is precisely the fashion in which appellant seeks to employ the writ. State, ex rel. Crebs, v. Crebs, v. Court of Common Pleas (1974), 38 Ohio St. 2d 51, 52 (67 O.O. 2d 61).

Appellant also contests the lawfulness of the appointment of Judge McMonagle, a retired judge, contending that Section 6(A)(3), Article IV of the Ohio Constitution requires a trial judge to have been elected and currently serving his term. That section provides in part:

"The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located***."

We reject appellant's contention and conclude that the aforementioned constitutional section must be read in pari materia with Section 6 (C), Article IV of the Ohio Constitution which provides, in pertinent part:

"*** Any voluntarily retired judge, or any judge who is retired under (31) this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge ***."

The record conclusively demonstrates that Judge McMonagle's assignment was made in accordance with Section 6(C), Article IV of the Ohio Constitution. Moreover, that portion of Section 6(A)(3), Article IV, pertains only to the election of judges and not to the temporary assignment of a judge having been duly elected and subsequently retired under Section 6(C), Article IV of the Constitution. Accord State v. Partanen (1940), 67 Ohio App. 248 (21 O.O. 231).

For all of the foregoing reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHER, HOLMES AND C. BROWN, J.J., concur.

J.P. CELEBREZZE, J., not participating.

[1]C.P. Sup. R. 4 provides:

"For the purpose of these rules, the individual assignment system is that system whereby, upon the filing in, or transfer to, a division of the court of a civil case, or upon arraignment in a criminal case, a case is immediately assigned by lot to a judge thereof, who thus becomes primarily responsible for the determination of every issue and proceeding in the case until its termination. Under such system, all preliminary matters, including requests for continuances, must be submitted for disposition to the judge to whom the case has been assigned, or if he is unavailable to the administrative judge.

"Each multi-judge general division of each court of common pleas shall adopt the individual assignment system as defined herein for the assignment of all cases to judges of the division for disposition."

[2]C.P. Sup. R. 3(B) provides, in pertinent part:

"The administrative judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves. He shall cause cases to be assigned to the judges within the division and shall require such reports from each judge concerning the status of assigned cases as he may require to assist him in discharging his overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay."

[3]C.P. Sup. R. 9 provides:

"Nothing in these superintendence rules prevents any local rule of practice which seeks to promote the use of any device or

procedure which would tend to facilitate the earlier disposition of cases, including the making of local rules of court restricting the volume of cases attorneys may undertake."

JOURNAL ENTRY AND OPINION OF THE COURT
OF APPEALS FOR CUYAHOGA COUNTY, OHIO

No. 45341
(Dated July 1, 1982)

COURT OF APPEALS OF OHIO
Eighth District
County of Cuyahoga

THE STATE, EX REL. BERGER,
Relator,
vs.
McMONAGLE, JUDGE, ET AL.,
Respondents.

JOURNAL ENTRY AND OPINION

MARKUS, J.:

Relator is the plaintiff in a Common Pleas Court case which was remanded to that court following an appeal to this court. Upon remand, the case was not assigned to the original judge. Instead, the administrative judge assigned it to another regularly serving judge of that court. One month later, the administrative judge caused the case to be transferred to his own docket and assigned it to a retired judge, in order to expedite its consideration.

Relator's objections to that ultimate

assignment were overruled by the assigned retired judge. Relator then filed this original action, seeking a writ of prohibition to prevent the respondent retired judge from hearing the case and a writ of mandamus ordering the respondent administrative judge to assign the case to a regularly serving judge by lot.

We grant respondents' motion for summary judgment because relator has an adequate remedy at law and because the reassignments were not improper or unlawful.

Relator claims that the administrative judge improperly reassigned the case to a second judge because the assignment entry failed to show the second judge was selected by lot and failed to state reasons for the reassignment. Relator relies principally on this court's decision in Berger v. Berger (Ct. App. Cuy. Cty., Oct. 22, 1981), No. 43365, but we find no support in that case for his argument.

In Berger v. Berger, a divorce case (filed by the relator in the present case) had been repeatedly reassigned to new judges without explanation while it was pending in the domestic relations division of the Common Pleas Court. We held that C.P. Sup. R. 4[1]

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[1]See C.P. Sup. R. 4, supra, A8.

required that a reassignment "must be accompanied by a journal entry executed by the administrative judge which states a justifiable reason for transferring responsibility for the case to another judge." Berger, supra at 10-11.

However, C.P. Sup. R. 4 does not specify the method used to select a judge when a case is remanded from an appellate court. Section 1, Rule 9 of the Manual for Operation of the /Cuyahoga County/ Common Pleas Court states: "Cases remanded by the Court of Appeals will be reassigned in the same manner as new filings." The procedure for assigning new cases is set forth in Local Rule 15 (A):

> "All civil cases shall be assigned to a judge by drawing a card from a sealed deck handled by the Clerk under the supervision of the Court Administrator. The deck shall be constructed so as to insure that the identity of the next judge name in the deck is unknown until the card is drawn."

The policy of reassigning a remanded case to a new judge is justifiable because the original judge may have some predisposition about the case or the parties. The requirement that a judgment entry should explain the reason for reassignment is satisfied by the appellate court's order remanding the case to the trial court.

Berger v. Berger, supra, does not require that a judgment entry show the method used to select a judge. Absent a contrary showing, selection by lot is presumed in conformity with the Superintendence Rule and the corresponding local rule. Further, in this case, the administrative judge's affidavit attached to the summary judgment motion affirmatively shows that the second judge was selected by lot from a sealed deck in compliance with Local Rule 15(A). Thus, the reassignment of the case to the second judge was entirely proper.

Relator further contends his case was improperly transferred from the second judge to the administrative judge's docket for expedited hearing by a retired judge. We disagree.

The preface to the rules of superintendence states:

> "Delay in both criminal and civil cases in the trial courts of Ohio is always a serious problem in the administration of justice. It is to be remembered that the courts are created not for the convenience or benefit of the judges and lawyers, but to serve the litigants and the interests of the public at large. When cases are unnecessarily delayed, the confidence of all people in the judicial system suffers. The confidence of the people in the ability of our system of government to achieve liberty and justice under

law for all is the foundation upon which the American system of government is built.

"The following rules are designed (1) to expedite the disposition of both criminal and civil cases in the trial courts of this state, while at the same time safeguarding the inalienable rights of litigants to the just processing of their causes; and (2) to serve that public interest which mandates the prompt disposition of all cases before the courts."

The powers of the administrative judge are set forth in C.P. Sup. R. 3(B):

"The administrative judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves. He shall cause cases to be assigned to the judges within the division and shall require such reports from each judge concerning the status of assigned cases as he may require to assist him in discharging his overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay." (Emphasis added)

Thus, we find a strong policy in favor of the prompt disposition of cases. The policy is reiterated in C.P. Sup. R. 9:

"Nothing in these superintendence rules prevents any local rule of practice which seeks to promote the use of any device or procedure

> which would tend to facilitate the earlier disposition of cases, including the making of local rules of court restricting the volume of cases attorneys may undertake."

Section 1, Item 9 of the Manual for the Manual for Operation of the /Cuyahoga County/ Common Pleas Court provides:

> "The Administrative Judge will undertake a periodic review of each Judge's Total caseload and provide for adjustments if and when necessary."

In his affidavit, the administrative judge stated:

> "5. That pursuant to my duties as Administrative Judge, I selected at random by computer several overage cases to be eligible for transfer from the assigned judge.
>
> "6. That Berger v. Palay, supra, was one of the cases selected at random for transfer and reassignment.
>
> "7. That upon selection of this case, I wrote a letter to Judge Sweeney on February 18, 1982, informing him of the eligibility of this civil action for transfer.
>
> "8. That Judge Sweeney transferred this case to my docket by journal entry dated February 22, 1982.
>
> "9. That upon transfer of this civil action to my docket for control purposes, I assigned the case to Judge George J. McMonagle for trial.

"10. That Judge McMonagle is a retired judge sitting by assignment of the Supreme Court of Ohio.

"11. That as a retired judge, Judge McMonagle does not have his own docket of cases."

Reassigning a case for the purpose of expediting the litigation is proper and commendable under the spirit of the rules of superintendence. Although it may have been better form for the journal entry to show that the case was transferred in order to avoid further delay in the disposition of the case, the affidavit of the administrative judge serves as sufficient explanation in this case.

Relator argues that his case should not have been assigned to a retired judge because Article IV, Sec. 6(A)(3) provides for the election of all judges. That section states:

"The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are locared, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located."

However, that section must be read in conjunction with Article IV, Section 6(C), which states in part:

> "Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled."

The constitutional provision that requires judges to be elected by electors in the counties where their courts are located does not apply to the temporary substitution or assignment of a retired judge. See State v. Partanen (1940), 67 Ohio App. 248, 251. See also State, ex rel. Winn, v. Galvin (1974), 39 Ohio St. 2d 58.

Relator contends he was denied his constitutional right to equal protection because his case was not assigned to the retired judge by lot. This argument lacks merit. The State has a legitimate interest in providing for the disposition of cases without delay. It is rational to assist this process by transferring older cases from judges with overcrowded dockets to available retired judges who can more promptly dispose of such cases.

Because retired judges are not regularly assigned cases and do not have their own dockets, their names cannot be included in the randomly ordered sealed deck from which regularly serving judges are selected. Therefore, it is rational to transfer the cases to the docket of the administrative judge and then assign them for hearing by the retired judge. Accordingly, relator's right to equal protection was not violated.

For the foregoing reasons, the procedures used to reassign relator's case were proper and lawful, and did not deprive the retired judge of jurisdiction. However, even if Relator's claim had substantive merit, we could not grant the requested relief.

This court may issue a writ of prohibition when the following conditions are shown to exist: "(1) the court or officer against whom it is sought must be about to exercise judicial or quasi-judicial power; (2) the exercise of such power must be unauthorized by law; and (3) it must appear that the refusal of the writ would result in injury for which there is no other adequate remedy." State, ex rel. Wall, v. Grossman (1980), 61 Ohio St. 2d 4, quoting State, ex rel. Lechmann, v. Cmich (1970), 23 Ohio St. 2d 11.

Relator has shown that the retired judge is about to exercise judicial power, but he has failed to show the existence of the remaining two prerequisites. Our examination of the situation discloses no circumstance which would deprive the retired judge of jurisdiction to hear relator's case, even if the assignment was improper. Thus, if relator prevails in the trial of the underlying case, his adversary could not assert the court's action was void for lack of jurisdiction. Moreover, if there had been an improper assignment, relator could have raised the issue on appeal to this court, just as he did in Berger v. Berger, supra.

A writ of mandamus will issue only upon a showing that relator has a clear legal right to the relief prayed for, respondent is under a clear legal duty to perform the requested act, and relator has no plain and adequate remedy at law. State, ex rel. Heller, v. Miller (1980), 61 Ohio St. 2d 6; State, ex rel. Akron Fire Fighters v. Akron (1978), 54 Ohio St. 2d 448.

Relator has not shown a clear legal right to have his case assigned by lot, rather than to an available retired judge. Nor has he shown that the administrative judge has a clear legal duty to do so. Furthermore, relator has an adequate remedy

at law, since he could raise the issue of an improper assignment in an appeal to this court.[2]

In Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 66, the court held:

> "The appositeness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor."

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[2]Relator does not assert any special incapacity of the assigned retired judge to hear this particular case. Any such claim would have to be raised by an affidavit of prejudice pursuant to R.C. 2701.03.

Respondents have satisfied all three requirements. Therefore, respondents' motion for summary judgment is granted and this case is dismissed at relator's costs.

CELEBREZZE, J. and

NAHRA, J. CONCUR.

RICHARD M. MARKUS
Presiding Judge

For Relator: Sanford J. Berger, Robert M. Fertel

For Respondents: John T. Corrigan, Thomas P. Gill Patrick Carroll

UNITED STATES CONSTITUTION

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE IV

Section 6, in pertinent part:

(A)(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which

his court is located.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

OHIO REVISED CODE
Section 141.16

Compensation of assigned retired judges

Any voluntarily retired judge, or any judge who is retired under Section 6 of Article IV, Ohio Constitution, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court, to active duty as a judge and while so serving shall receive the established compensation for such office, computed on a per

diem basis, in addition to any retirement benefits to which he may be entitled.

Upon submission of a voucher signed by the administrative director of the Ohio courts, the auditor of state shall issue a warrant upon the treasurer of state for the entire amount payable to the assigned judge. Annually, on the first day of August, the auditor of state shall issue a billing to the county treasurer of any county to which such a judge is assigned for reimbursement of the county's portion of the compensation previously paid by the state for the twelve-month period preceding the last day of June. The County's portion of compensation shall be that part of each per diem paid by the state which is proportional to the county's share of the total compensation of a resident judge of such court. The county treasurer shall forward the payment within thirty days.

LOCAL RULE 15
COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

(A) All civil cases shall be assigned to a judge by drawing a card from a sealed deck handled by the Clerk under the supervision of the Court Administrator. The deck shall be constructed so as to insure that the identity of the next judge name in the

deck is unknown until the card is drawn.

(B) It shall be the duty of the individual judge to handle all court activity, including motions and emergency matters, status hearings, pretrials, trials etc. associated with the cases assigned to him.

(C) The scheduling of civil cases for status hearings and pretrials will he handled by the Central Scheduling Office (CSO) in accordance with the Manual of Operations maintained by that office.

(D) The scheduling of a case for trial will be accomplished by the judge to whom the case is assigned. A trial date will be set as the judge decides or at the conclusion of the pretrial when no settlement has been effected.